Nelson Filter, A Division of Nelson Industries, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO. Case 18-CA-6282

April 20, 1981

DECISION AND ORDER

On September 30, 1980, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein.

Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

Respondent is a manufacturer of filters, silencers, and related products, located in Neillsville, Wisconsin. The Union was certified on January 11, 1977. From on or about October 19, 1977, until on or about March 2, 1978, certain of Respondent's unit employees engaged in a strike. The striking employees picketed Respondent's plant throughout that period. On December 29, 1977, the General Counsel, by the Regional Director for Region 18, issued a complaint and notice of hearing alleging Respondent's failure to bargain in good faith, in violation of Section 8(a)(5) of the Act, and its discriminatory discharge of one employee, in violation of Section 8(a)(1) and (3) of the Act. These allegations (Cases 18-CA-5587-1,-2) were settled under Board auspices, the agreement being signed by Respondent on February 8, 1978, and approved by the Regional Director for Region 18 on February 16. This "Board settlement agreement" extended the certification year to September 11 of that year and provided that Respondent would reinstate all the strikers, "dismissing, if necessary, any persons hired" after the strike began, or if insufficient positions were available, would place strikers on a preferential hiring list so that "they will be offered employment if available in bargaining unit jobs before any other persons are hired." In this agreement it was stipulated that Respondent did not admit any unfair labor practice.

On March 7, 1978, "in accordance with the 'Settlement Agreement' reached February 16, 1978," the Union submitted to Respondent an application for reinstatement on behalf of 28 employees, each of whom signed the application. Respondent and the Union were engaged at the time in mediated collective bargaining, where they agreed on a detailed procedure for reinstatement of strikers that would apply without prejudice to the parties' positions in ongoing bargaining, which agreement was set out in a letter by Respondent dated March 9, 1978, and approved by the Union on March 11. From then until the time of the hearing before the Administrative Law Judge on December 7, 1979, Respondent did not offer reinstatement to any of the employees who had applied on March 7, 1978. Beginning on February 26, 1979, following decertification of the Union on January 16, Respondent hired several new employees.

The Administrative Law Judge found that Respondent offered no evidence of a substantial and legitimate business reason for failing to rehire any of the former strikers and instead hiring younger employees with less experience. He concluded that the strikers' right to reinstatement was not affected by the passage of time[2] or by the decertification of the Union that had represented them, and that former strikers who had not returned Respondent's "questionnaire" of May 5, 1978, did not thereby waive reinstatement.[3] Thus, the Administrative Law Judge found that Respondent discriminated against the former strikers by hiring new employees instead of reinstating strikers as it had agreed to do, and thus violated Section 8(a)(3) and (1) of the Act. We agree.

However, the Administrative Law Judge mistakenly concluded that "the violation can only be applicable to employees who have not acquired regular and substantially equivalent employment." This condition is traditionally applied to economic strikers for whom reinstatement is not immediately available (see *The Laidlaw Corporation*, 171 NLRB 1366, 1370 (1968)), but not to discriminatees under the Act. See *Ford Motor Company*, 31 NLRB 994, 1099-1100 (1941), approved in *N.L.R.B.* v. *Regal*

[1] The Administrative Law Judge's Decision contained critical typographical errors, especially regarding dates, which have now been corrected to avoid confusion.

[2] The settlement agreement in this case, unlike that in *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382, 385-388 (1971), contained no termination date.

[3] In adopting this conclusion, we note that the questionnaire followed the strike settlement agreement by only 2 months, and that it could reasonably have been interpreted as an attempt to unilaterally override or add conditions to that settlement. The accompanying letter said, "Although we have been presented with a list of names by the union indicating that everyone on the list has applied for reinstatement, it is necessary to make the list more meaningful by knowing who intends to return to work if any jobs would become available later." The Union advised former strikers to respond by sending Respondent a copy of the strike settlement agreement, and many did so. Viewing Respondent's conduct as a whole, we conclude that the questionnaire was not a good-faith attempt to gather needed information. Cf. *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 637 (1973), where the Board agreed that an employer could, at reasonable intervals, request employees on a recall list to renew their applications.

Knitwear Company, 140 F.2d 746, 747 (2d Cir. 1944), affd. on other grounds 324 U.S. 9 (1945); *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 189–197 (1941). The former strikers here are *not* economic strikers, and the Administrative Law Judge so found.[4] Their status as economic or unfair labor practice strikers was mooted by the settlement agreements, which did not exclude from reinstatement those strikers employed elsewhere, nor set a time limit on reinstatement. See *Beverage-Air Company*, 164 NLRB 1127, 1156 (1967); see also *Puritana Manufacturing Corporation*, 159 NLRB 518, 533 (1966).

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, by hiring replacements for strikers after the strikers had unconditionally applied for reinstatement and Respondent had agreed to reinstate them, we shall order Respondent to cease and desist from such unfair labor practices. We shall also order Respondent to maintain the preferential hiring list and recall procedures agreed to in the settlement (letter of March 9, approved by the Union on March 11, 1978), and to fill vacancies that have occurred or may occur since that date, according to that agreement.[5] Respondent must offer immediate reinstatement to, and otherwise make whole, those employees on the list who would have been recalled but for Respondent's discriminatory hiring of replacements on and after February 26, 1979.[6] Backpay for these employees, and interest thereon, shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

The Administrative Law Judge, in his recommended Order, provided that Respondent "rescind" the hiring of new employees on and after February 26, 1979. We shall order, instead, that Respondent dismiss those employees "if necessary" to make room for former strikers. See *Calcite Corporation*, 228 NLRB 1048, 1049–50 (1977); *Mount Hope Finishing Company, et al.*, 106 NLRB 480, 499 (1953). Respondent may retain the "new" employees if it offers reinstatement to all former strikers except those who have resigned.[8]

In addition to the customary notice-posting provision, we shall order Respondent to mail copies of the notice to the former strikers at their last known home address. This is to insure that these employees, not currently working at Respondent's plant, are informed of this Decision. See *Creative Engineering, Inc.*, 228 NLRB 582, 583 (1977).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Nelson Filter, A Division of Nelson Industries, Inc., Neillsville, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL–CIO, or any other labor organization, by failing to reinstate former strikers to positions for which they are qualified, with full seniority and other rights and privileges previously enjoyed, pursuant to its agreement to do so.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action to effectuate the purposes of the Act:

(a) Maintain a preferential hiring list of all employees named in the attached "Appendix A," and implement the recall procedures previously agreed to by Respondent and the Union and, as vacancies occur, offer reinstatement to the named former strikers to positions for which they qualify, dismissing if necessary any employee hired on or after February 26, 1979, as set out more fully in the section of this Decision entitled "The Remedy."

(b) Offer immediate and full reinstatement to any employee who would have been recalled on or after February 26, 1979, but for Respondent's discrimination against former strikers, without prejudice to their seniority or other rights and privileges, and make those employees whole for any loss of earnings and benefits they may have suf-

[4] See his "Analysis and Conclusions," second paragraph. He inadvertently referred to "economic strikers" in the section of his Decision entitled "The Remedy"; in Conclusion of Law 3; in par. 1(a) of the recommended Order; and in the first paragraph of his notice. We hereby correct those references.

[5] The Order does not include three employees—Charles Henchen, Edward Kristian, and Michael Ranczyski—who signed the application for reinstatement dated March 7, 1978, but who were not named in the complaint in this case. Respondent maintains in its brief that these three employees have resigned.

[6] Resp. Exhs. 6 and 7 show that Respondent, between February 26 and May 14, 1979, filled at least six positions with new employees.

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute interest on the backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[8] Respondent contends that a proper order would allow it to retain the new employees while former strikers remain on recall status. Respondent confuses this situation with that of permanent replacements for *economic* strikers hired during a strike. See *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

fered as a result of Respondent's discrimination against them.

(c) Post at its Neillsville, Wisconsin, plant copies of the attached notice marked "Appendix B."[9] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. In addition, copies of the notice, duly signed by Respondent's representative, shall be mailed to all employees who signed the application for reinstatement of March 7, 1978, at their last known home addresses. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[9] In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Wilbert Breheim	Herbert Laib
Randy E. Brown	Edward Malinowski
Marvin Burkhalter	David D. Michalak
Raymond Burzynski	Bernard D. Nikolai
Richard Cram	Zbignieu Oksa
Alfred Daul	Larry D. Parker
Gerald Eberhardt	Larry M. Reinart
Eleanor M. Gaede	Ronald Sterzinger
Arlene L. Gerhardt	Kenneth H. Syth
Geraldine Hansen	Helen Winters
Joseph Holman	Willard L. Winters
Steven Knapp	Lawrence G. Yankee
	William J. Zilk

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

EMPLOYEES HAVE THE RIGHT TO STRIKE, under the National Labor Relations Act; they also have the right to join or assist labor organizations such as International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, or to refrain from such activity.

The National Labor Relations Board has found, after a hearing, that we violated the National Labor Relations Act by not reinstating our formerly striking employees to available positions after they had unconditionally applied for reinstatement on March 7, 1978.

We hereby notify our employees that:

WE WILL NOT discriminate against former strikers by ignoring their preferential recall-rehiring rights and hiring new employees in their stead.

WE WILL NOT in any other manner interfere with employees in the exercise of their rights under the National Labor Relations Act.

WE WILL maintain the preferential hiring list and recall procedures that we agreed to at the conclusion of the strike on March 7, 1978, which provides that available positions are to be offered to the employees named below who applied for reinstatement and have not resigned:

Wilbert Breheim	Joseph Holman
Randy E. Brown	Steven Knapp
Marvin Burkhalter	Herbert Laib
Raymond Burzynski	Edward Malinowski
Richard Cram	David D. Michalak
Alfred Daul	Bernard D. Nikolai
Gerald Eberhardt	Zbignieu Oksa
Eleanor M. Gaede	Larry D. Parker
Arlene L. Gerhardt	Larry M. Reinart
Geraldine Hansen	Ronald Sterzinger
	Kenneth H. Syth
	Helen Winters
	Willard L. Winters
	Lawrence G. Yankee
	William J. Zilk

WE WILL offer immediate and full reinstatement to any employee who would have been recalled on or after February 26, 1979, if we had not instead hired new employees at that

time, and WE WILL make them whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination against them, with interest.

WE WILL dismiss any employee hired on or after February 26, 1979, if that is necessary to make room for the employees on the list above.

NELSON FILTER, A DIVISION OF NELSON INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon a charge of unfair labor practices filed on June 7, 1979, by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, the Charging Party, herein called the Union, against Nelson Filter, A Division of Nelson Industries, Inc., herein called Respondent, a complaint was issued by the Regional Director for Region 18, on behalf of the General Counsel on July 30, 1979. The substance of the complaint alleges that Respondent has failed and refused to recall 26 names entitled to preferential recall as openings became available, because said employees engaged in activities on behalf of the Union, including their participation in a strike at Respondent.

Respondent filed an answer denying that it has engaged in unfair labor practices as set forth in the complaint.

A hearing in the above matter was held before me at Neillsville, Wisconsin, on December 6 and 7, 1979. Counsel for the General Counsel elected to make a summary argument on the record in lieu of the submission of a brief. A brief has been received from counsel for Respondent. Counsel for the General Counsel's summary argument and counsel for Respondent's brief have been carefully considered.

Upon the entire record in this case and from my observations of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material herein, a Wisconsin corporation with an office and place of business in Neillsville, Wisconsin, herein called Respondent's facility, where it has been engaged in the manufacture and retail sale and distribution of filters, silencers, and related products. During the past year, a representative period, Respondent in the course and conduct of its business operations sold and shipped from its Neillsville, Wisconsin, facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Wisconsin. During the course and conduct of its business operations herein described, Respondent purchased and received at its Neillsville, Wisconsin, facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Wisconsin.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, herein called the Union, is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Respondent is engaged in the production of filters, silencers, replaced elements, and related products used by engine manufacturers in the automotive industry and engine powered equipment industries.

The parties stipulated that in Case 18-RC-11207 a petition for representative certification was filed by the Union herein and an election agreement was approved on December 13, 1976. An election was held in the case on January 4, 1977, and the Union won the election by a vote of 55 to 39. The Union was certified and the Certification of Representative was issued January 11, 1977, for a production and maintenance unit.

The parties stipulated that the charge in Case 18-CA-5587 was filed by the Union on October 19, 1977, alleging a violation of Section 8(a)(1), (3), and (5) of the Act. On the same date, October 19, 1977, a charge was filed in Case 18-CA-5587-2 by Helen Winters, alleging a violation of Section 8(a)(1), (3), and (5) of the Act. The cases were consolidated and a complaint and notice of hearing issued on December 29, 1977. However, the complaint was settled by a settlement agreement approved by the Regional Director on February 16, 1978. The settlement agreement herein is General Counsel's Exhibit 3.

The parties stipulated that on November 5, 1977, a decertification petition was filed by Mary Strangefeld in Case 18-RD-827, on the grounds that there was a certification year bar to an election.

The parties stipulated that a petition was filed by the employer, George Wilson, general manager of Nelson Filter, on November 14, 1977. The petition was dismissed on November 29, 1977, on the grounds of certification year bar.

On February 2, 1978, in Case 18-RD-844 a decertification petition was filed by employee Strangefeld but was dismissed on February 14, 1978, by the Regional Director, upon the grounds that there was a settlement agreement which by its terms extended the certification year to September 11, 1978, and consequently the petition could not be entertained and was dismissed.

The parties stipulated that a charge was filed in Case 18-CA-5842 on June 2, 1978, by the Union alleging violation of Section 8(a)(1), (3), and (5) of the Act. That

charge was dismissed by the Regional Director on July 31, 1978.

The parties further stipulated that a petition for certification was filed by employee Mary Strangefeld on November 13, 1978, in Case 18-RD-894. In that case an election agreement entered into by the parties was approved on December 20, 1978. An election was held on January 9, 1979, wherein the Union lost the election by a vote of 48 to 10 and certification of the results of that election was issued January 16, 1979.

The parties stipulated that the Union filed a charge in the instant proceeding on June 7, 1979.

Finally, the parties stipulated that the following named employees were employees of Respondent's Neillsville facility as of October 18, 1977, immediately before the strike began on October 19, 1977:

Wilbert Breheim	Edward Malinowski
Randy E. Brown	David D. Michalak
Marvin Burkhalter	Bernard D. Nikolai
Raymond Burzynski	Zbignieu Oksa
Richard Cram	Larry D. Parker
Alfred Daul	Larry M. Reinart
Gerald Eberhardt	Ronald Sterzinger
Eleanor M. Gaede	Kenneth H. Syth
Arlene L. Gerhardt	Helen Winters
Geraldine Hansen	Willard L. Winters
Joseph Holman	Lawrence G. Yankee
Steven Knapp	William J. Zilk
Herbert Laib	

All of the above-named employees went on strike at Respondent's Neillsville facility and remained on strike from October 19, 1977, until or about March 2, 1978.

At all times material herein, the following-named persons occupied the positions set forth with their respective names and are now, and have been at all times material herein, supervisors of Respondent within the meaning of Section 2(11) of the Act, and are agents of Respondent within the meaning of Section 2(13) of the Act: George R. Wilson, division president, and Marvin E. Marg, plant manager.[1]

The strike herein referred to was settled pursuant to a settlement agreement between the parties on February 16, 1978. The agreement specifically provided that "the execution of this SETTLEMENT AGREEMENT does not constitute an admission of any unfair labor practice." Thus, the question as to whether the striking employees were unfair labor practice strikers or economic strikers was not determined in resolving the dispute between the parties. The settlement agreement provided for a preferential hiring list or rehiring list which among other things provided in pertinent part as follows:

> 1. The application for reinstatement made by the Union on March 7, 1978 shall be considered as a blanket application on behalf of all strikers;
>
> 2. Reinstatement to available work shall be made on the basis of plant seniority (total service at the Neillsville Filter Plant) provided the person reinstated can perform such available work immediately upon reinstatement:
>
> 3. The reinstatement offer shall be made by a letter sent certified mail, Restricted Delivery, Return Receipt Requested, to the last known address of the person, with a copy sent to the Union;
>
> * * * * *
>
> 7. The Employer will maintain a preferential hiring list containing all persons eligible for reinstatement who are not reinstated to bargaining unit jobs when and if such jobs become available.
>
> The agreement with respect to the reinstatement policy is without prejudice to the Employer and the Union concerning their positions on relevant matters in the ongoing collective bargaining between them currently in mediation. The sole purpose of the reinstatement policy is to facilitate an orderly process for reinstatement as it may occur. As a result of such agreement, the labor dispute shall cease and all signs shall be removed from the vicinity of the plant promptly.

B. *Respondent's Compliance with the Settlement Agreement's Preferential Recall Procedure*

The acknowledged and credited evidence established that in November 1978 Respondent's plant manager, Marvin Marg, went to the office of Paul Penshon, branch office manager of the Wisconsin Department of Human Relations, Job Service Division, in Neillsville, introduced himself, and initiated a general conversation about Respondent's operation in Neillsville. About a month later, Manager Marg returned to Penshon's office and discussed the status of the strike and mode of recalling the striking employees. Penshon told Marg he was a labor market analyst and not a labor relations expert. Penshon said he was being used as a sounding board, regarding a seniority list for recalling striking employees. Some of the striking employees had filed applications for employment in his (Penshon's) office.

During the last week in February 1979, Manager Marg visited Penshon's office again, and Penshon testified with respect to that visit as follows: "The entire thrust of the conversation revolved around his request for referrals."

At that time Manager Marg gave Penshon a verbal list of several occupations for which he had job openings. Some of such job positions were as follows: (1) Machinists; (2) Maintenance; (3) Several for general laborers; and (4) Welding.

Manager Marg told Penshon he wanted experienced help in maintenance and machining.

In response to a call-in card dated February 2, 1979, mailed to Edward Malinowski by Penshon's office (because Malinowski had experience in electrical machine maintenance) he received a long-distance call from Malinowski. During the conversation Penshon told Malinowski he had listed the skills required for the position at Nelson Filter. Malinowski said he was involved in a labor dispute at Nelson Filter and his response was, "Well, that's my position." Penshon then told Malin-

[1] The facts set forth above are not in conflict in the record.

owski the strike was settled and referred him to the Union's steward or to the National Labor Relations Board, because his job service office policy is not to get involved in labor disputes. Malinowski, 59 years of age, was employed by Respondent in 1974 until the strike in which he participated occurred on October 19, 1977. He corroborated the testimony of Penshon with respect to the above-described telephone conversation, except he added that he asked Penshon did he think he (Malinowski) should go back to Nelson Filter. Penshon replied, "As far as we're concerned they do not wish to hire any of you people back." Penshon did not resume the stand thereafter to deny the latter statement attributed to him. Consequently, I credit Malinowski's statement in this regard.

1. Respondent employs new employees

Wesley Buttke appeared and testified pursuant to subpena that he was employed by Respondent on April 9, 1979. He said he was interviewed for the job by Manager Marg who gave him a week to report to work. There was no conversation concerning the duration of his employment so he assumed that it was permanent. He was hired at $3.60 per hour in the welding department and now earns $4.35 per hour. Manager Marg told him there would be wage increases in the future. Also at the time of his employment, Manager Marg told him there was a strike but at present Respondent was a nonunion shop. Buttke's testimony is not denied by Manager Marg and is therefore credited.

Warren Kinnick also appeared and testified pursuant to subpena that he is 28 years of age and was hired by Respondent on May 14, 1979. At the time he was interviewed for the job by Manager Marg, he said, there was no discussion as to whether the job was permanent or temporary, but he assumed it was permanent. He said he applied for the job on Thursday and was hired and reported to work on Monday, May 14, for $3.85 per hour. He was hired as a maintenance man but was assigned to work as a lathe operator. He now earns $4.35 per hour in the lathe department under the supervision of Frank Sager. He said his work experience included welding, radial drill, and lathe work.

At the time he was interviewed for employment, Kinnick said he asked Marg whether the Union squabble was over because he did not want to get involved in it, and Marg said the Union was out and they would have no more trouble. Marg did not deny this interview conversation and I credit Kinnick's account.

Walter Michalak is 43 years of age and testified that he was employed by Respondent 24 years. He has been a maintenance, tool-and-dye foreman for the past 5 years. He acknowledged he has the authority to recommend hiring and firing of employees and he did not vote in the election because he was a foreman. However, since March 1, 1979, he testified that, in addition to employees Kinnick and Buttke, the Respondent has employee Mark Hills in filter assembly, Earl Heuber in maintenance, and Rick Schanebeck in filter assembly. He also stated that Nelson Muffler is a division of Nelson Filter.

2. Resolution of the strike

Roger Gellerstedt, union representative for 3-1/2 years, testified that he organized Nelson Filter and caused the election to take place in 1976. He was involved in contract negotiations after the union certification as spokesman for the negotiating committee, composed of employees Willard Winters, Marvin Burkhalter, Eleanor Gatney, Richard Cram, and Geraldine Hanson from the time of certification in January 1977 until September 1978. He stated that the duration of the strike was from October 19, 1977, until March 7, 1978.

Gellerstedt further testified that during the strike all of the employees heretofore described under topic A participated in the strike (along with three others who have since retired or resigned from Respondent) from its inception until it ended on March 7. He further testified, undisputedly, that before the strike ended the parties entered into a settlement agreement (G.C. Exh. 3) which was executed on February 16, 1978. On March 6, 1978, a signed list of striking employees requested immediate reinstatement to Respondent. The list was subsequently submitted to Respondent on March 7, 1978, in a meeting with Federal Commissioner Simon Zuiker, who transmitted it to Respondent (President George Wilson and Mr. Brewster, counsel for Respondent) who were meeting in an adjacent room. At a later time Gellerstadt said he received information from the striking employees that Respondent had hired some new employees. After verifying such fact, the Union filed the unfair labor practice charges herein.

General Counsel Exhibit 6 is a letter from Respondent dated March 9, 1978, agreeing to the recall procedure outlined in General Counsel Exhibits 5 and 6.

As of the date of these proceedings none of the striking employees have been recalled to work by Respondent.

3. Respondent contacts striking employees

The parties stipulated that on or about May 5, 1978, Respondent mailed a letter (Resp. Exh. 3) to substantially all of the employees named in paragraph 5 of the complaint asking all employees to complete an attached questionnaire and return it to Respondent by May 22, 1978. The letter in pertinent part said:

> Although we have been presented with a list of names by the Union indicating that everyone on that list has applied for unconditional reinstatement, it is necessary to make the preferential hiring list more meaningful by knowing who intends to return to work if any jobs would become available later. Therefore, if you complete and return the enclosed application/questionnaire by May 22, 1978, we may be assured of your intent to return to work.

The last paragraph of the above-discussed letter said if the employees had any questions to please contact Respondent. According to the testimony of union representative Gellerstedt, the employees discussed the subject letter (Resp. Exh. 3) and he told the employees the Union had some concern with the language of the letter

and with such questions as "are you presently employed?" in view of the pendency of the petition before the Board. Some employees responded to the letter and others did not. He told the employees if he were in their shoes he would not respond to the Respondent's letter (Resp. Exh. 3). The employees were nevertheless furnished with a copy of the settlement agreement (G.C. Exh. 3).

4. The response of the striking employees

All of the following employees received a copy of Respondent's letter (Resp. Exh. 3) hereinbefore described:

Hubert Laib, 62 years of age, was employed by Respondent from July 21, 1974, until the strike on October 19, 1977. He is now employed by Neillsville Foundry.

Willard Winters is 34 years of age and was employed by Respondent from February 28, 1974, until the strike on October 19, 1977. He also served on the negotiating committee and testified that he can perform the same work now being performed by employee Buttke. He is now employed at Neillsville Foundry.

Edward A. Malinowski is 59 years of age and was employed by Respondent from April 1974 until the employees' strike on October 19, 1977. He can perform the work now being performed by employee Buttke.

Geraldine Hansen is 35 years of age and was employed by Respondent from April 15, 1974, until the employees' strike on October 19, 1977. She is now employed at Neillsville Foundry.

Marvin Burkhalter is 50 years of age and was employed by Respondent from October 21, 1974, until the employees' strike on October 19, 1977.

Eleanor Gaede was employed by Respondent from August 10, 1970, until the employees' strike on October 19, 1977. She now works 12 miles away from home.

Steven Knapp is 29 years of age and was employed by Respondent from August 1976 until the employees' strike on October 19, 1977. He testified that he went to the plant in June 1978 and asked Manager Marg about reemployment. Marg said, "No, we can't hire the people on the picket line." Knapp is now employed 20 miles away from home.

William Zilk was employed by Respondent from October 27, 1975, until the employees' strike on October 19, 1977. He now works for Neillsville Foundry.

Alfred Daul is 60 years of age and was employed by Respondent from 1972 until the employees' strike on October 19, 1977. He now works for Neillsville Foundry and he went to the plant and spoke to Manager Marg on July 1978 about a week's vacation that was due him. Marg acknowledged that he would receive his vacation pay and Daul asked him about the possibility of reemployment. Marg said, "It would have to wait until everything is settled." Manager Marg denied that he made the latter statement in such context but stated that he told Daul "that this wasn't settled yet," and "as long as the strike wasn't completely settled and the Union was still in, he would have to negotiate with the Union."[2]

Richard Cram was employed by Respondent from August 1966 until the employees' strike on October 19, 1977. He is now employed at Neillsville Foundry. In August 1978, Cram, Marvin Burkhalter, and Zilk went to visit the plant before the union election, which the employees lost, and spoke with Manager Marg. They asked Marg for reemployment of all the striking employees. Marg said Respondent had no job openings at the time, but he might be able to get back to them at a later time. Marg did not tell them at that time he could not reemploy anyone on the strike line.

Significantly all of the above-named employees undisputedly testified that they did receive a copy of Respondent's letter with the appended questionnaire (Resp. Exh. 3). Only Alfred Daul completed the questionnaire indicating that he would return to work at Nelson Filter. All of the other striking employees hereinbefore named did not complete the questionnaire and did not respond to the letter except by way of mailing to Respondent a copy of the settlement agreement (G.C. Exh. 3) because, after a meeting of the employees with union representative Gellerstedt, they agreed that to complete the questionnaire might suggest that they were new employees applying for work. On the contrary, they deemed themselves still employees of Respondent and believed that the settlement agreement with its preferential recall list was sufficient for Respondent to recall them. Although the great majority of the employees who testified in this proceeding are presently employed elsewhere, each of them categorically stated that they desired to return to work at Nelson Filter because they liked the work, the work environment was cleaner and healthier, they were not subjected to dust, gases, and dirty work as those who are now employed by Neillsville Foundry. Moreover, some of the employees stated that they would prefer to work at Nelson Filter because they would be closer to home than their present employment. All of them stated that they would accept a lesser salary than they are presently earning to return to Nelson Filter; that they desired to return to employment at Nelson Filter; and that they would seriously consider any offer for employment by Respondent.

All of the employees who participated in the strike also picketed Respondent's plant from the inception of the strike until its end on or about March 2, 1978.

The parties herein stipulated that if the following-named employees were to testify at this proceeding their testimony would be substantially the same as the testimony of the above-described witnesses: Bernard Nikolai, Ronald Sterzinger, Kenneth Syth, Helen Winters, Arlene Gerhardt, Gerald Eberhardt, Zbignieu Oksa, and Larry Reinart.

Except for entitlement to profit sharing and the amount of profit sharing (vested), a letter similar to General Counsel Exhibit 7 was sent to the following employees on or about May 4, 1979: Richard Cram, Gerald Eberhardt, Eleanor Gaede, Arlene Gerhardt, Joe

[2] I credit the testimony of employees Alfred Daul, Stephen Knapp, and Richard Cram, to the effect that in or about July 1978 Manager Marg told them Respondent was not reemploying any of the striking or picketing employees until "*this*" (strike) is settled, because the union was still the representative of the employees. Manager Marg's version is essentially consistent with the above-described versions. To the extent that Marg's version differs, I discredit it because it is unsupported and against the logical consistency of the credited evidence of record.

Holman, Hebert Laib, Bernard Nikolai, Zebignieu Oksa, Kenneth Syth, Willard Winters, Lawrence Yankee, and Alfred Daul.

None of the above 12 named employees responded or withdrew their benefits from the profit-sharing plan. The remaining 13 employees did not have vested funds in Respondent's profit-sharing plan.

Analysis and Conclusions

The Union herein alleges that Respondent violated Section 8(a)(3) and (1) of the Act by hiring new employees in violation of a settlement agreement which provided for the preferential rehiring of striking employees.

The issues presented for determination herein do not embrace a subordinate question as to whether the strikers were economic or unfair labor strikers. Even if that question were a part of the original dispute, it became moot by the settlement agreement entered into between the parties on February 16, 1978, in which all of the strikers made a blanket signed request for job reinstatement, and Respondent agreed to a preferential recall-rehiring of the strikers.

Thus, it is clear that the strike in the instant controversy commenced on or about October 19, 1977, and ended on or about March 7, 1978, subsequent to the parties' execution of the settlement agreement (including a preferential recall-rehiring list) on February 16, 1978. At that time, all of the striking employees unconditionally applied for job reinstatement in writing. Respondent accepted their application without imposing any conditions on its acceptance with respect to operative duration of the applications, or duties of the strikers to periodically furnish information about their health, qualifications, or continued availability.

On May 5, 1978, Respondent sent a letter-questionnaire to all of the strikers requesting them to again indicate their desire to return or not to return to work, as well as any changes in their skills or health status, etc. Only one or two of the strikers completed the questionnaire and returned it to Respondent by May 22, 1978, as requested. The remaining majority of strikers, on the suggestion of the Union, simply mailed Respondent a copy of the settlement agreement which included the signed blanket application to return to work (G.C. Exh. 3).

During and after the strike Respondent was able to maintain its production and meet its sales needs without hiring any replacements by a skillful use of overtime work. Nevertheless, the record shows that in November 1978 Respondent's plant manager, Marvin Marg, visited the job service division of the Wisconsin Department of Human Relations, and discussed Respondent's business operations in general with Penshon. Manager Marg returned to Penshon's office in December 1978, and discussed the status of the strike and mode of recalling the striking employees. He was seeking a reaction from Penshon to his discussion but he received no assistance in that regard.

Certain employees in the bargaining unit filed a decertification petition and a consent election agreement was reached on December 20, 1978. Consequently, an election was held on January 9, 1979, during which the Union lost the election and the results thereof were certified on January 16, 1979. At no time since the execution of the settlement agreement on February 16, 1978, did Respondent ever recall or offer to rehire any of the strikers whose names were part of the settlement agreement. However, it is particularly noted that Respondent's Plant Manager Marg visited Penshon's office again in either late January or the first of February 1979 and gave Penshon the following list of positions for which Respondent wanted help: (1) Machinist, (2) Maintenance, (3) Several for general laborers, and (4) Welding.

Marg emphasized that he wanted experienced help in the maintenance and machining positions.

During a prompt response to one of Penshon's cards dated February 2, 1979, Edward Malinowski called Penshon long distance and learned that the skills outlined by Penshon represented the former position he worked at Nelson Filter. Penshon advised Malinowski that the strike was settled and that he should contact either the Union or the National Labor Relations Board. He also told Malinowski Respondent did not want to rehire any of the strikers.

Subsequently, after March 1, 1979, Respondent hired Rick Schanebeck and Mark Hills in filer assembly, and Earl Heuber in maintenance. On April 9, 1979, Respondent hired Wesley Buttke in welding, and on May 14, 1979, it hired Warren Kinnick as a maintenance man. None of the employees were advised that they were hired in a temporary capacity and it may be reasonably inferred from the evidence of record that all of them were hired in a permanent capacity.

Respondent denied that it has discriminated against any of the strikers by failing to offer them reinstatement or by employing the above-described new employees. On the contrary, Respondent affirmatively argues that it has not offered reinstatement to any of the strikers because it has not had any job vacancies for which they were qualified to perform; that the settlement agreement has been in effect for more than 1 year, which is a reasonable time beyond which strikers reinstatement rights should not persist; and since the Union was decertified on January 16, 1979, Respondent's duty to recall and rehire strikers was abated with decertification.

Counsel for the General Counsel did not submit a brief in this proceeding in spite of my urgence, but elected to make an oral argument on the record in lieu of submitting a brief. In his oral summary of record, counsel for the General Counsel, in support of his allegations in the complaint and the evidence introduced in the hearing, cited the following authority: The *Fleetwood Trailer* case cited by the Supreme Court, the *Laidlaw* case later cited by the Board and the courts, and more recently in *Vitronic Division of Penn Corporation*, 239 NLRB 45 (1978).

In *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967), the Supreme Court held that the hiring of new employees at a time when there are outstanding applications for reinstatement for striking employees is presumptively a violation of the Act, regardless of intent, unless the employer demonstrates "legitimate and substantial business justifications" for his failure to hire the strikers.

In this regard Respondent presented evidence of a decline in the work force from 163 employees in 1974 to 66 on December 1, 1979; and that this reduction is attributed to automation in assembly line operations and better management techniques. It is observed, however, that Respondent did not show how automation and better management techniques prevented the strikers from performing their previous line of work or adjusting to any new business techniques or automative changes. This is particularly true when it is further observed that after March 1, 1979, Respondent hired new employees, younger in age and with less experience, to perform in its automative assembly operations and under new management techniques. It is not shown that the strikers were either unqualified or incapable of adapting to whatever changes Respondent's operations now require. Consequently, I find that Respondent failed to offer any evidence which demonstrates a legitimate and substantial business reason for failing to rehire any of the strikers. *Fleetwood Trailer Co., supra.* Therefore, Respondent has not successfully rebutted the presumption of violation of the Act.

In *Laidlaw Corporation* v. *N.L.R.B.*, 414 F.2d 99, 103 (7th Cir. 1969), the court said the Board in its decision held:

> [T]hat economic strikers "who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements" not only remain employees, but are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment or unless the employer has sustained his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

The Board in further following *Laidlaw* held in *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634 (1973), that strikers are entitled to reinstatement "when jobs for which they are qualified become available."

The uncontroverted evidence of record shows that striker Alfred Daul not only was one of the few if not the only employee who completed Respondent's letter-questionnaire of May 2, 1978, but he also visited the plant and asked Plant Manager Marg for reemployment. Marg clearly told Daul he could not be rehired as long as the union matter was not settled. Additionally, strikers Richard Cram, Marvin Burkhalter, and William Zilk visited the plant in August 1978 and asked Manager Marg for reemployment. In essence, Marg gave them the same answer, that the Union was still in and until the matter could be settled they could not be reemployed. When these factors are considered in conjunction with Respondent's hiring new employees after the Union was decertified in March, April, and May 1979, it may be reasonably inferred, and I so find, consistent with witness Penshon's testimony, that Respondent not only did not comply with the settlement agreement but that it did not intend to rehire any of the striking employees.

Respondent also argues that its letter-questionnaire sent to the strikers in May 1978 was a reasonable inquiry within the guidelines suggested by the court in *American Machinery Corporation* v. *N.L.R.B.*, 424 F.2d 1321 (5th Cir. 1970), and the Board, in *Brooks Research, supra.* However, I do not find that Respondent's letter-questionnaire was in significant compliance with the court's suggestion therein, which reads as follows:

> . . . he might notify the strikers when they request reinstatement of a reasonable time during which their applications will be considered current and at the expiration of which they must take affirmative action to maintain their current status.

Here, Respondent did not notify the strikers at the time they made their blanket request for reinstatement that it would request them to affirmatively furnish Respondent information about their intent to return, their skills, and availability on a periodic basis. Instead, Respondent notified the strikers for the first time about inquiries for such information, when it mailed them its letter-questionnaire on May 2, 1978. Although all except one of the strikers did not respond to the specific inquiries of Respondent's questionnaire, they did mail to Respondent a copy of the prior settlement agreement which could only be interpreted by Respondent as a reaffirmance of their desire and availability for reinstatement.

In contending that it did not have any substantially equivalent jobs or job openings for reinstatement of the strikers, Respondent characterized the jobs it filled after February 26, 1979, as entry-level positions. However, the evidence does not support Respondent in this regard. On the contrary, it is clear from the evidence that several of the positions filled by new employees, Buttke, Kinnick, Schanebeck, Hills, and Heuber, to the extent they were described at the hearing by the new employees and by Penshon of the Wisconsin jobs division, were essentially the equivalent of the jobs previously performed by strikers. Again, it becomes readily apparent, amidst Respondent's several contentions, that it failed to offer a single striker job reinstatement, including the one striker (Daul) who did complete its letter-questionnaire and return it to Respondent, as well as employees Daul, Cram, Burkhalter, and Zilk, who personally reapplied for employment with Manager Marg in July and/or August 1978.

Respondent has failed to establish that none of the jobs for which it hired new employees were not essentially the same jobs previously performed by striking employees.

Finally, Respondent argues that its obligation to recall and offer reinstatement to the strike employees expired with a reasonable lapse of time (almost a year) and the decertification of the Union, citing *Laidlaw* and *Brooks Research, supra.* An examination of both cases shows that the Board rejected the arguments for a reasonable or a fixed (1 year) lapse of time as the life duration of reinstatement rights, except where the parties (employer and striker) agree to such a time limitation at the time the request for reinstatement is made.

In resolving the issue of a challenged ballot and eligibility of economic strikers, the Board has held that a striker's right to reinstatement "may be lost, *inter alia*, by some action of the striker himself, such as accepting

other permanent employment, by which he has evinced an intention to abandon his interest in his struck job regardless of the outcome of the strike." *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359 (1962).

Not only was there not a single striker recalled and rehired by Respondent, but its efforts to recruit new employees through the state employment department, as well as it having hired approximately five new employees, is sufficient evidence, in the face of the settlement agreement, to establish a *prima facie* showing of unlawful motives by Respondent.

Additionally, with respect to Respondent's argument as to when a striker's right to reinstatement expires, the Board further held in *Laidlaw Corporation, supra*, as follows:

> Laidlaw argues that the Board's decision "creates in perpetuity a vested interest of an employee in the job, or any substantially equivalent job, he held when he first went on strike." It asks: "When does a striker's right to reinstatement expire, if ever?" The answer to this argument is that here the employer refused to consider reinstatement only days after the strikers applied and vacancies occurred. In these circumstances, the Board was not required to determine what the impact of the passage of time or inability to notify applicants of vacancies might have on the employer's duty to honor applications for reinstatement.[3]

In its argument that the strikers' reinstatement rights died with the Union's decertification, Respondent does not cite any board or court authority to support its contention. By analogy it argues that rights under a settlement agreement, or the Union's authority to enforce the agreement or to act for the decertified unit, expired with decertification. However, the Board has long since held that the reinstatement right of an economic striker is a statutory right which transcends the existence of a union and a settlement agreement. *W. C. McQuaide, Inc.*, 239 NLRB 671 (1978). Hence, it would appear that decertification of the Union had no adverse effect upon the strikers' right for reinstatement by Respondent. Thus, since the Board has consistently denied the imposition of a fixed limitation upon the reinstatement rights of strikers, and since such rights may initially exist for striking employees in the absence of a union, or subsequent to decertification of the Union, Respondent's failure to recall or reinstate any of the striking employees prior to hiring new employees in their place, violated Section 8(a)(1) and (3) of the Act.

However, Respondent's violation can only be applicable to employees who have not acquired regular and substantially equivalent employment elsewhere. The record shows that a number of strikers who testified in this proceeding had acquired such employment even though they testified they would consider returning to work at Respondent if they received an offer for reinstatement. While the witnesses' testimony in this regard may very well be tactical, I do not find that it presents an insurmountable problem because Respondent has not offered employment to any of the strikers. It has hired only five new employees and the record does not show that all of the striking employees have acquired regular and substantially equivalent employment elsewhere. In other words, it would appear from the facts in the instant case that the only way Respondent can successfully rebut the presumption of its violation of the Act is by offering reinstatement to the strikers on its list for the positions which it filled subsequent to February 26, 1979. Inasmuch as Respondent has not recalled or offered reinstatement to any striking employees, notwithstanding its obligation under the settlement agreement to do so, its violation of the Act is very well established for every position which could have been filled by a striking employee qualified to perform the job. Marg acknowledged that Daul would receive his vacation pay and Daul asked him about the possibility of reemployment. Marg said, "It would have to wait until everything is settled." Manager Marg denied that he made the latter statement in such context but stated that he told Daul that "this wasn't settled yet," and "as long as the strike wasn't completely settled and the Union was still in, he would have to negotiate with the Union."[4]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating the economic strikers' preferential hiring rights, the recommended Order will provide that Respondent rescind the hiring of new employees action it took after February 26, 1979, and to reinstitute the preferential hiring list agreed to by Respondent and the Union on the same date. The recommended Order will further provide that the reinstatement rights of said strike employees continue in accordance with the applicable principles of law as set

[3] We do not view the employer's duty to seek out replaced economic strikers to be a severe burden in practice. "Employers, who presumably retain the addresses and phone numbers of the strikers, should not find it overly burdensome to give them notice that a position has fallen vacant." 82 Harv.L.Rev. 1777, 1779 (1969).

[4] I credit the testimony of employees Alfred Daul, Stephen Knapp, and Richard Cram to the effect that in or about July 1978 Manager Marg told them Respondent was not reemploying any of the striking-picketing employees until "this [strike] is settled," because the Union was still the representative of the employees. Manager Marg's version is essentially consistent with the above-described versions. To the extent that Marg's version differs, I discredit it because it is unsupported and against the logical consistency of the credited evidence of record.

forth in *Fleetwood* and *Laidlaw, supra*, and that as vacancies occur, for whatever reason, offer reinstatement to those strike employees who are qualified for reinstatement to such positions unless they have obtained regular and substantially equivalent employment. Any strike employees who would have been recalled but for Respondent's unlawful conduct should be reinstated to the positions in which they would have been placed had they been recalled, without prejudice to their seniority or other rights and privileges and made whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977),[5] except as modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

Upon the basis of the above findings of fact and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW

1. Nelson Filter, A Division of Nelson Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(6) and (7) of the Act.

3. By discriminatorily terminating the economic strikers' preferential hiring rights, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).